2004

State of Utah v. Clifton Yazzie : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
CLIFTON YAZZIE,	:	Case No. 20040285-CA
Defendant/Appellant.	:	

BRIEF OF APPELLEE

Appeal From Convictions for Driving Under the Influence of Alcohol with Two Prior Offenses, a Third Degree Felony, in Violation of UTAH CODE ANN. § 41-6-44(2)(a) & (6)(a) (West 2004); Operating a Motor Vehicle without Operator's Security, a Class B Misdemeanor, in Violation of UTAH CODE ANN. § 41-12a-302 (West 2004); and Driving on a Suspended or Revoked Operator's License, a Class C Misdemeanor, in Violation of UTAH CODE ANN. § 53-3-227(1) (West 2004), in Seventh Judicial District Court, Lyle R. Anderson, Presiding

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ORAL ARGUMENT REQUESTED

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BRIEF OF APPELLEE

JURISDICTIONAL STATEMENT

Defendant appeals from his convictions for driving under the influence of alcohol with two prior convictions, a third degree felony, in violation of UTAH CODE ANN. § 41-6-44(2)(a) & (6)(a) (West 2004); operating a motor vehicle without operator's security, a class B misdemeanor, in violation of UTAH CODE ANN. § 41-12a-302 (West 2004); and driving on a suspended or revoked operator's license, a class C misdemeanor, in violation of UTAH CODE ANN. § 53-3-227(1) (West 2004). This Court has jurisdiction pursuant to UTAH CODE ANN. § 78-2a-3(2)(e) (West 2004).

STATEMENT OF ISSUE AND STANDARD OF APPELLATE REVIEW

Did the officer reasonably suspect that defendant was driving illegally based on the officer's knowledge that in well over one hundred previous encounters, spanning some twenty years, defendant never produced a driver's license when asked for identification?

The denial of a motion to suppress presents a mixed question of law and fact. The trial court's factual findings are reviewed only for clear error. Its legal conclusions are reviewed non-deferentially for correctness. ***See State v. Brake***, 2004 UT 95, ¶¶ 12 & 15, 512 Utah Adv. Rep. 49.

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

The Fourth Amendment of the United States Constitution is determinative of this appeal and is attached in *Addendum A*, together with other cited provisions.

STATEMENT OF THE CASE

Defendant was charged with felony driving under the influence (DUI), driving without security (no insurance), and driving on a suspended driver's license (R. 1-3). Prior to trial, he moved to suppress the evidence on the ground that the stop of his vehicle was not justified by reasonable suspicion (R. 18-19). The court heard evidence and orally denied the motion (R58: 9-10, 22-29). ***See*** *Addendum B (Argument and Oral Ruling)*. Defendant then entered guilty pleas to the charged offenses, but reserved his right to appeal the denial of the motion to suppress (R. 39-45; R58: 31-34).

On March 30, 2004, defendant was sentenced to concurrent statutory terms of zero-to-five years imprisonment (DUI), six months imprisonment (no insurance), and ninety days imprisonment (suspended license). On April 7, 2004, defendant timely appealed (R. 52). Defendant was subsequently released from custody pending appeal.

STATEMENT OF FACTS[1]

Mike Halliday was the chief of police for Blanding, Utah (R58: 5). He was a life-long resident of the small town and had been one of its police officers for twenty-nine years (R58: 5, 10). He knew defendant for at least twenty of those years (R58: 6). The chief or other officers in his department had stopped or arrested defendant "well over a hundred" times (R58: 8-9). The majority of police encounters were alcohol-related—public intoxication and disorderly conduct (R58: 9). The chief knew of none involving driving (R58: 14-15).

During each of these prior encounters, defendant was asked for identification (R58: 6-7, 17). To Chief Halliday's knowledge, defendant never produced a driver's license as identification (R58: 6-7, 16-17). The last time the chief personally asked defendant for identification was approximately one year prior to the current offense (R58: 16). As before, defendant did not produce a license as identification (R58: 6-7, 16-17).[2]

Defendant was a Utah resident (R58: 6, 10, 28). The chief had been to defendant's home in White Mesa, Utah, and knew that defendant always gave this address when he was booked into jail (R58: 10-11). During the twenty years the chief had known defendant, he

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[1] The facts are stated in the light most favorable to the trial court's ruling. ***See Litherland***, 2000 UT 76, ¶ 2, 12 P.3d 92.

[2] Defendant states only that the chief and defendant had "several" encounters. ***See*** *Brief of Appellant [Br.Aplt.]* at 4 & 13. The marshaled evidence establishes a much more extensive relationship. The chief personally asked defendant for identification "numerous" times "in excess of ten" and participated in or was aware of "well over a hundred" other police encounters involving as request for identification of defendant (R58: 8-9, 16-17).

had never seen defendant drive a vehicle (R58: 15). Based on his knowledge of defendant, the chief did not believe he was licensed to drive in Utah (R58: 7-8, 15).

On October 15, 2003, Chief Halliday was driving in Blanding when he saw defendant driving a vehicle (R58: 7). The officer was shocked. "Ah, the first thing that I thought of is that [defendant] did not – did not have a driver's license. I would have bet anything that he had no driver's license" (R58: 7). The chief attempted to pull defendant over, but by the time the vehicles stopped, defendant had traveled four blocks (R58: 7, 12).[3] The chief observed no other traffic violations before stopping defendant (R58: 8).

The chief asked defendant for a driver's license (R58: 19). Defendant produced an Arizona license (id.). Contemporaneously, the chief smelled alcohol on defendant and observed other signs of intoxication (id.). The chief called dispatch to determine the validity of the Arizona license, but was more concerned with the DUI and asked dispatch to contact Officer Mike Bradford to conduct field sobriety tests on defendant (R58: 20).

When contacted, Officer Bradford also asked dispatch to determine defendant's license status (R57: 6-8, 10). After Bradford arrived at the scene, dispatch verified that defendant's Arizona license was "valid," but that defendant also had an expired Colorado license and a suspended Utah license (R57: 8).[4] Officer Bradford conducted the field

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[3] Defendant suggests that the chief followed defendant for four blocks before making the decision to pull him over (*Br.Aplt. at 5-6*). The marshaled evidence is otherwise. The chief testified that he immediately stops anyone he suspects of driving without a license. In this case, he attempted to do so, but the two cars traveled about four Blanding blocks before defendant actually stopped (R58: 7, 12-14).

[4] The trial court found that the Arizona license, through facially valid, did not authorize defendant to drive in Utah because defendant, a Utah resident, had his Utah

sobriety tests, which defendant failed (R57: 7-8). Subsequent testing revealed that defendant's blood-alcohol was .22, almost three times the legal limit (R57: 8).

SUMMARY OF ARGUMENT

The Fourth Amendment requires that an officer reasonably suspect a defendant of criminality before stopping him for questioning. In determining if reasonable suspicion exists, the reviewing court must consider the totality of the circumstances in a common sense practical manner.

As the trial court noted, the totality of the circumstances in this case is unusual. Rarely does a police officer have a twenty year history involving well over one hundred encounters with the same defendant. Yet, here, it is undisputed that Chief Halliday did. Consequently, the chief could reasonably rely on his personal knowledge of defendant in objectively assessing defendant's current conduct. Though Chief Halliday's knowledge of defendant was unique, any person possessing this same knowledge would have reasonably reached the same conclusion as the chief: defendant was likely driving illegally. The stop was, therefore, permissible.

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driving privileges suspended as a result of DUI convictions in 1995 and 2001 (R. 1-3; R57: 11; R58: 28-29) (*Add. B*). ***See also*** UTAH CODE ANN. § 53-3-225(2) (West 2004) (*Add. A*) (prohibiting a Utah resident, whose license is suspended, from driving in Utah under another jurisdiction's license until a new Utah license is issued).

ARGUMENT

REASONABLE SUSPICION BASED ON TWENTY YEARS OF ENCOUNTERS WITH DEFENDANT JUSTIFIED THE STOP

A police officer may not compel an individual to stop unless there exists a reasonable articulable suspicion that the individual committed or is in the process of committing a crime. ***See State v. Deitman***, 739 P.2d 616, 617-18 (Utah 1987); ***Salt Lake City v. Ray***, 2000 UT App 55, ¶¶ 12-13, 998 P.2d 274. Reasonable suspicion is more than a "mere hunch" and requires some factual foundation. ***See United States v. Arvizu***, 534 U.S. 266, 273 (2002) (citing ***United States v. Cortez***, 449 U.S. 411, 417-18 (1981)). Nevertheless, "the likelihood of criminal activity need not raise to the [probability] level required for probable cause." ***Id.*** at 274 (citing ***Terry v. Ohio***, 392 U.S. 1, 27 (1968), and ***United States v. Sokolow***, 490 U.S. 1, 7 (1989)). Instead, reasonable suspicion occurs when, based on the totality of the circumstances, there exists a "substantial possibility that criminal conduct has occurred or is about to occur." 4 Wayne R. LaFave, ***Search & Seizure*** § 9.4(b), at 146 (3rd ed. 1996). ***See also Arvizu***, 534 U.S. at 273-74; ***Sokolow***, 490 U.S. at 7.

Reasonable suspicion is not negated by an equal "possibility of innocent conduct." ***Arvizu***, 534 U.S. at 274-75 (citing ***Terry***, 392 U.S. at 22, and ***Sokolow***, 490 U.S. at 9). ***See also United States v. Price***, 599 F.2d 494, 502 (2d Cir. 1979) ("It must be rare indeed that an officer observes behavior consistent Only [sic] with guilt and incapable of innocent interpretation. [internal citations omitted] In such a situation, there would be far more than reasonable suspicion; indeed there would be more than grounds necessary to support a finding of probable cause.") Consequently, even when facts observed by the officer are

"ambiguous and susceptible of an innocent explanation," the Fourth Amendment permits a limited detention to "resolve the ambiguity." ***Illinois v. Wardlow***, 528 U.S. 119, 125 (2000) (citing and interpreting ***Terry***, 392 U.S. at 30). ***See also State v. Waldner***, 556 N.W.2d 681, 684 (Wis. 1996) ("The law allows a police officer to make an investigatory stop based on observations of lawful conduct so long as the reasonable inferences drawn from the lawful conduct are that criminal activity is afoot.").

Moreover, a reviewing court is precluded from individually assessing the facts known to the officer, but must view the totality of facts and reasonable inferences as a whole and in light of the officer's "own experience and specialized training." ***Arvizu***, 534 U.S. at 274-75; ***Sokolow***, 490 U.S. at 8. ***Accord State v. Warren***, 2003 UT 36, ¶ 14, 78 P.3d 590 (reiterating proper reasonableness analysis).

Here, the trial court concluded that Chief Halliday reasonably suspected defendant was not validly licensed to drive because:

> 1. The chief knew defendant for twenty years;
>
> 2. The chief knew defendant was a Utah resident, had been to his Utah home, and was aware that he always claimed a Utah address when booked into jail;
>
> 3. The chief had never seen defendant drive a motor vehicle;
>
> 4. The normal practice of the Blanding Police Department is to ask for identification, preferably a driver's license, from every stopped individual;
>
> 5. The chief participated in or was personally aware of well over one hundred police encounters (stops and arrests) of defendant by the local police;
>
> 6. The chief personally asked defendant for identification numerous times in excess of 10, though the chief could not remember if he specifically used the term "driver's license" in asking for identification;

7. The last time the chief asked defendant for identification was approximately one year prior to the present offense;

8. During these one hundred plus encounters, including the encounter one year prior to this incident, defendant never produced a driver's license.

(R58: 5-20, 28-29). ***See also*** *Add. B.* Below, defendant conceded that if the last encounter had been more recent, the facts could support reasonable suspicion (R58: 24).[5] But defendant argued that because the last encounter occurred approximately one year before the stop, the chief's information was stale and should be disregarded (R58: 24-25).[6]

The trial court properly rejected defendant's argument. The court agreed that the timing and frequency of the past encounters were factors to be considered, but concluded that

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[5] Defense counsel argued: "[P]erhaps had the officer stopped him, like in the last couple of week[s] of the last – certainly the day before or certainly five minutes before, and found out the Mr., ah, Yazzie didn't have a driver's license, than maybe he would have more of a – of an articulable suspicion" (R58: 24).

[6] Defendant argued that if the prior knowledge were disregarded, the chief would have been obligated to contact dispatch to verify the license status before stopping defendant (R58: 24-25). ***See also*** *Brief of Appellant [Br.Aplt.] at 14-15, 18-19.* If no reasonable suspicion existed, defendant is correct. However, if suspicion existed, then "[t]he reasonableness of an officer's decision to stop a suspect does not turn on the availability of less intrusive investigatory techniques." ***Sokolow***, 490 U.S. at 11 (other citations and internal quotation marks omitted). ***See also United States v. Sharpe***, 470 U.S. 675, 686-87 (1985) ("A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by the objectives of the police might have been accomplished. But the fact that the protection of the public might, in the abstract, have been accomplished by less intrusive means does not, by itself, render the search unreasonable."); ***State v. Harmon***, 910 P.2d 1196, 1203-04 (Utah 1995) (recognizing that driving on a suspended license is a serious continuing offense, which justifies an immediate stop and arrest). Consequently, if the chief reasonably suspected defendant of driving illegally, an immediate stop was justified without seeking dispatch verification. If on the other hand, reasonable suspicion was lacking, the chief would have been required to contact dispatch to determine the license status before stopping defendant. As implied by the trial court, verification before the stop would have resulted in probable cause to arrest and not merely reasonable suspicion to stop (R58: 22).

here the unusual length (twenty years) and unusual number (well over one hundred), justified the officer's suspicions:

> Ah, the reason that I think that it was reasonable for the officer to stop is that it was such a long time that the defendant had never had a license. I think it's reasonable to – to believe he still doesn't have one, and he's driving now. But's there's a fairly strong argument the other way. You know, maybe he decided to go get a license, before he started drivin' [sic]. And in fact, he did. In this case it turned out he did. He got it from the wrong agency. It didn't do him any good. It was both wrong, because he wasn't a resident of Arizona, and because his license was – and even if it was a valid Arizona license, it was useless in Utah, because his privilege to drive in Utah was suspended. But he had — he had apparently decided he wanted to try to get a license.
>
> But I think it was reasonable for this officer to suspect that he did not have a license, that he was driving based on that long history and the frequent contact.
>
> This is an unusual case. I wouldn't ordinarily permit an officer to stop someone just because once before, somebody didn't have a license. But the number of times and the extended period of time, I think it was reasonable for just him just to assume that yeah, he still didn't have a license.

(R58: 28-29) (*Add. B*). ***Cf. State v. Norris***, 2001 UT 104, ¶ 16 n.4, 48 P.3d 872, *cert. denied*, 535 U.S. 1062 (2002); ***State v. Singleton***, 854 P.2d 1017, 1021 (Utah App. 1993) (both recognizing that the existence of an on-going activity refutes a staleness claim).

On appeal, defendant expands his argument. Citing ***State v. Lopez***, 873 P.2d 1127 (Utah 1994), defendant claims for the first time that the chief's prior knowledge of defendant could not be considered because it was based on a "mistaken assumption" that defendant was never licensed in any jurisdiction. ***See*** *Br.Aplt. at 9, 14, 17-19, 23.* Additionally, for the first time, defendant argues that a defendant's criminal history alone can never establish a reasonable suspicion (*Br.Aplt. at 20*). Because these arguments were not preserved, their merits should not be considered. ***See State v. Richins***, 2004 UT App 36, ¶ 8, 86 P.3d 759

(reaffirming preservation/waiver rule). Even if the merits are considered, the arguments lack legal and factual support.

Lopez does not control this case. In ***Lopez***, 873 P.2d at 1134-40, the supreme court addressed the pretext arrest doctrine and concluded that if justification existed for a stop, the stop was lawful under the Fourth Amendment regardless of the subjective motivation of the officer in stopping the suspect. Nevertheless, the court ultimately remanded to determine if, in fact, the claimed moving violation justified the stop. ***Id.*** at 1133-34. In doing so, the court agreed that the officer did not otherwise have reasonable suspicion to stop Lopez because even though the officer thought defendant had no license this was based on the officer's mistaken belief that Lopez was another individual (Jose Cruz). ***Id.*** at 1129-30.

In this case, Chief Halliday was not mistaken as to defendant's identity or as to his lack of a valid license at the time of the stop. Contrary to defendant's assertion, *Br.Aplt. at 9, 14, 17-19, 23*, the issue is not whether defendant ever had a Utah license, but whether he was driving illegally on October 15, 2003, when observed by Chief Halliday. As the trial court correctly found, defendant was not licensed to drive in Utah at the time of the stop (R58: 28-29) (*Add. B*). Why he was not licensed is irrelevant. That defendant had prior DUI's, had a Utah license at some unspecified prior point in time, had an expired Colorado license, or had, as the trial court termed it, a "useless" Arizona license did not change the fact that at the time of the stop, the chief correctly suspected that defendant was not licensed to

drive in Utah.[7]

Nor is defendant correct that a knowledge of a defendant's criminal history may never be considered in determining reasonable suspicion. ***See*** *Br.Aplt. at 20.* The trial court clearly rejected the notion that defendant's prior alcohol violations would alone justify the assumption that he was drunk while driving (R58: 9-10). ***Accord United States v. Sandoval***, 29 F.3d 537, 542-43 (10th Cir. 1994) (holding that the "mere fact" that a suspect has been previously arrested for a similar offense does not alone create reasonable suspicion). But the trial court properly considered the circumstances of the one hundred plus stops and arrests in determining the reasonableness of the chief's assumption that because defendant had never produced a driver's license before, it was likely he did not have one now (R58: 28-29). ***Accord id.*** at 542 (citing numerous cases where prior convictions have been considered, with other factors, in establishing reasonable suspicion); ***United States v. Feliciano***, 45 F.3d 1070, 1074 (7th Cir. 1995) (recognizing that knowledge of prior criminal conduct is "of doubtful *evidentiary* value . . . [but] is a permissible component of articulable suspicion required for a ***Terry*** stop"). ***See also State v. Humphrey***, 937 P.2d 137 (Utah App. 1997) (upholding reliance on trustworthy information concerning Humphrey's past criminal involvement in assessing reasonable suspicion).

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[7] Defendant asserts that the trial court improperly considered the subsequent verification by dispatch in determining if reasonable suspicion existed (*Br.Aplt. at 21*). Defendant is incorrect. The trial court concluded that reasonable suspicion existed based on the chief's knowledge at the time of the stop, to wit, that for twenty years and in over one hundred encounters, defendant never produced a license and was never seen driving (R58: 28-29).

In sum, Chief Halliday's knowledge—that for twenty years and in over one hundred encounters, defendant never produced a license and was never seen driving—supports a reasonable suspicion that defendant was driving illegally on October 15, 2003. The stop, therefore, was justified and defendant's motion to suppress properly denied.

CONCLUSION

Defendant's convictions should be affirmed.

RESPECTFULLY SUBMITTED this 22 day of December, 2004.

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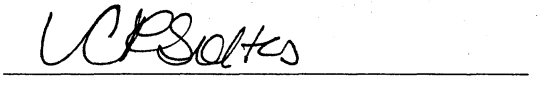
CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing Brief of Plaintiff/Appellee were mailed to William L. Schultz, attorney for Defendant/Appellant, 69 East Center, P.O. Box 937, Moab, UT 84532, this 22 day of December, 2004.



Addenda

Addendum A

Amendment IV. Search and seizure

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

§ 41–6–44. Driving under the influence of alcohol, drugs, or a combination of both or with specified or unsafe blood alcohol concentration—Measurement of blood or breath alcohol—Criminal punishment—Arrest without warrant—Penalties—Suspension or revocation of license

(1) As used in this section:

(a) "assessment" means an in-depth clinical interview with a licensed mental health therapist:

(i) used to determine if a person is in need of:

(A) substance abuse treatment that is obtained at a substance abuse program;

(B) an educational series; or

(C) a combination of Subsections (1)(a)(i)(A) and (B); and

(ii) that is approved by the Board of Substance Abuse and Mental Health in accordance with Section 62A–15–105.

(b)(i) "conviction" means any conviction for a violation of:

(A) this section;

(B) alcohol, any drug, or a combination of both-related reckless driving under Subsections (9) and (10);

(C) Section 41–6–44.6, driving with any measurable controlled substance that is taken illegally in the body;

(D) local ordinances similar to this section or alcohol, any drug, or a combination of both-related reckless driving adopted in compliance with Section 41–6–43;

(E) automobile homicide under Section 76–5–207;

(F) Subsection 58–37–8(2)(g);

(G) a violation described in Subsections (1)(b)(i)(A) through (F), which judgment of conviction is reduced under Section 76–3–402; or

(H) statutes or ordinances in effect in any other state, the United States, or any district, possession, or territory of the United States which would constitute a violation of this section or alcohol, any drug, or a combination of both-related reckless driving if committed in this state, including punishments administered under 10 U.S.C. Sec. 815;

(ii) A plea of guilty or no contest to a violation described in Subsections (1)(b)(i)(A) through (H) which plea is held in abeyance under Title 77, Chapter 2a, Pleas in Abeyance, is the equivalent of a conviction, even if the

charge has been subsequently reduced or dismissed in accordance with the plea in abeyance agreement, for purposes of:

(A) enhancement of penalties under:

(I) this Chapter 6, Article 5, Driving While Intoxicated and Reckless Driving; and

(II) automobile homicide under Section 76-5-207; and

(B) expungement under Section 77-18-12.

(c) "educational series" means an educational series obtained at a substance abuse program that is approved by the Board of Substance Abuse and Mental Health in accordance with Section 62A-15-105;

(d) "screening" means a preliminary appraisal of a person:

(i) used to determine if the person is in need of:

(A) an assessment; or

(B) an educational series; and

(ii) that is approved by the Board of Substance Abuse and Mental Health in accordance with Section 62A-15-105;

(e) "serious bodily injury" means bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death;

(f) "substance abuse treatment" means treatment obtained at a substance abuse program that is approved by the Board of Substance Abuse and Mental Health in accordance with Section 62A-15-105;

(g) "substance abuse treatment program" means a state licensed substance abuse program;

(h) a violation of this section includes a violation under a local ordinance similar to this section adopted in compliance with Section 41-6-43; and

(i) the standard of negligence is that of simple negligence, the failure to exercise that degree of care that an ordinarily reasonable and prudent person exercises under like or similar circumstances.

(2)(a) A person may not operate or be in actual physical control of a vehicle within this state if the person:

(i) has sufficient alcohol in the person's body that a subsequent chemical test shows that the person has a blood or breath alcohol concentration of .08 grams or greater at the time of the test;

(ii) is under the influence of alcohol, any drug, or the combined influence of alcohol and any drug to a degree that renders the person incapable of safely operating a vehicle; or

(iii) has a blood or breath alcohol concentration of .08 grams or greater at the time of operation or actual physical control;

(iv)(A) is 21 years of age or older;

(B) has sufficient alcohol in the person's body that a subsequent chemical test shows that the person has a blood or breath alcohol concentration of .05 grams or greater at the time of the test;

(C) has a passenger under 16 years of age in the vehicle at the time of operation or actual physical control; and

(D) committed the offense within ten years of a prior conviction; or

(v)(A) is 21 years of age or older;

(B) has a blood or breath alcohol concentration of .05 grams or greater at the time of operation or actual physical control;

(C) has a passenger under 16 years of age in the vehicle at the time of operation or actual physical control; and

(D) committed the offense within ten years of a prior conviction.

(b) The fact that a person charged with violating this section is or has been legally entitled to use alcohol or a drug is not a defense against any charge of violating this section.

(c) Alcohol concentration in the blood shall be based upon grams of alcohol per 100 milliliters of blood, and alcohol concentration in the breath shall be based upon grams of alcohol per 210 liters of breath.

(3)(a) A person convicted the first or second time of a violation of Subsections (2)(a)(i) through (iii) is guilty of a:

(i) class B misdemeanor; or

(ii) class A misdemeanor if the person:

(A) has also inflicted bodily injury upon another as a proximate result of having operated the vehicle in a negligent manner;

(B) had a passenger under 16 years of age in the vehicle at the time of the offense; or

(C) was 21 years of age or older and had a passenger under 18 years of age in the vehicle at the time of the offense.

(b) A person convicted of a violation of Subsection (2) is guilty of a third degree felony if the person has also inflicted serious bodily injury upon another as a proximate result of having operated the vehicle in a negligent manner.

(c) A person convicted of a violation of Subsection (2)(a)(iv) or (v) is guilty of:

(i) a class B misdemeanor; or

(ii) a class A misdemeanor if the person has also inflicted bodily injury upon another as a proximate result of having operated the vehicle in a negligent manner.

(4)(a) As part of any sentence imposed the court shall, upon a first conviction, impose a mandatory jail sentence of not less than 48 consecutive hours.

(b) The court may, as an alternative to all or part of a jail sentence, require the person to:

(i) work in a compensatory-service work program for not less than 48 hours; or

(ii) participate in home confinement through the use of electronic monitoring in accordance with Subsection (13).

(c) In addition to the jail sentence, compensatory-service work program, or home confinement, the court shall:

(i) order the person to participate in a screening;

(ii) order the person to participate in an assessment, if it is found appropriate by a screening under Subsection (4)(c)(i);

(iii) order the person to participate in an educational series if the court does not order substance abuse treatment as described under Subsection (4)(d); and

(iv) impose a fine of not less than $700.

(d) The court may order the person to obtain substance abuse treatment if the substance abuse treatment program determines that substance abuse treatment is appropriate.

(e)(i) Except as provided in Subsection (4)(e)(ii), the court may order probation for the person in accordance with Subsection (14).

(ii) If there is admissible evidence that the person had a blood alcohol level of .16 or higher, the court shall order probation for the person in accordance with Subsection (14).

(5)(a) If a person is convicted under Subsection (2) within ten years of a prior conviction under this section, the court shall as part of any sentence impose a mandatory jail sentence of not less than 240 consecutive hours.

(b) The court may, as an alternative to all or part of a jail sentence, require the person to:

(i) work in a compensatory-service work program for not less than 240 hours; or

(ii) participate in home confinement through the use of electronic monitoring in accordance with Subsection (13).

(c) In addition to the jail sentence, compensatory-service work program, or home confinement, the court shall:

(i) order the person to participate in a screening;

(ii) order the person to participate in an assessment, if it is found appropriate by a screening under Subsection (5)(c)(i);

(iii) order the person to participate in an educational series if the court does not order substance abuse treatment as described under Subsection (5)(d); and

(iv) impose a fine of not less than $800.

(d) The court may order the person to obtain substance abuse treatment if the substance abuse treatment program determines that substance abuse treatment is appropriate.

(e) The court shall order probation for the person in accordance with Subsection (14).

(6)(a) A conviction for a violation of Subsection (2) is a third degree felony if it is:

(i) a third or subsequent conviction under this section within ten years of two or more prior convictions; or

(ii) at any time after a conviction of:

(A) automobile homicide under Section 76–5–207 that is committed after July 1, 2001; or

(B) a felony violation under this section that is committed after July 1, 2001.

(b) Any conviction described in this Subsection (6) which judgment of conviction is reduced under Section 76–3–402 is a conviction for purposes of this section.

(c) Under Subsection (3)(b) or (6)(a), if the court suspends the execution of a prison sentence and places the defendant on probation the court shall impose:

(i) a fine of not less than $1,500; and

(ii) a mandatory jail sentence of not less than 1,500 hours.

(d) For Subsection (6)(a) or (c), the court shall impose an order requiring the person to obtain a screening and assessment and substance abuse treatment at a substance abuse treatment program providing intensive care or inpatient treatment and long-term closely supervised follow-through after treatment for not less than 240 hours.

(e) In addition to the penalties required under Subsection (6)(c), if the court orders probation, the probation shall be supervised probation which may include requiring the person to participate in home confinement through the use of electronic monitoring in accordance with Subsection (13).

(7) The mandatory portion of any sentence required under this section may not be suspended and the convicted person is not eligible for parole or probation until any sentence imposed under this section has been served. Probation or parole resulting from a conviction for a violation under this section may not be terminated.

(8)(a)(i) The provisions in Subsections (4), (5), and (6) that require a sentencing court to order a convicted person to: participate in a screening; an assessment, if appropriate; and an educational series; obtain, in the discretion of the court, substance abuse treatment; obtain, mandatorily, substance abuse treatment; or do a combination of those things, apply to a conviction for a violation of Section 41–6–44.6 or 41–6–45 under Subsection (9).

(ii) The court shall render the same order regarding screening, assessment, an educational series, or substance abuse treatment in connection with a first, second, or subsequent conviction under Section 41–6–44.6 or 41–6–45 under Subsection (9), as the court would render in connection

with applying respectively, the first, second, or subsequent conviction requirements of Subsections (4), (5), and (6).

(b)(i) The court shall notify the Driver License Division if a person fails to:

(A) complete all court ordered:

(I) screening;

(II) assessment;

(III) educational series;

(IV) substance abuse treatment; and

(V) hours of work in compensatory-service work program; or

(B) pay all fines and fees, including fees for restitution and treatment costs.

(ii) Upon receiving the notification described in Subsection (8)(b)(i), the division shall suspend the person's driving privilege in accordance with Subsections 53-3-221(2) and (3).

(9)(a)(i) When the prosecution agrees to a plea of guilty or no contest to a charge of a violation of Section 41-6-45, of an ordinance enacted under Section 41-6-43, or of Section 41-6-44.6 in satisfaction of, or as a substitute for, an original charge of a violation of this section, the prosecution shall state for the record a factual basis for the plea, including whether or not there had been consumption of alcohol, drugs, or a combination of both, by the defendant in connection with the violation.

(ii) The statement is an offer of proof of the facts that shows whether there was consumption of alcohol, drugs, or a combination of both, by the defendant, in connection with the violation.

(b) The court shall advise the defendant before accepting the plea offered under this Subsection (9)(b) of the consequences of a violation of Section 41-6-44.6 or of Section 41-6-45.

(c) The court shall notify the Driver License Division of each conviction of Section 41-6-44.6 or 41-6-45 entered under this Subsection (9).

(10) A peace officer may, without a warrant, arrest a person for a violation of this section when the peace officer has probable cause to believe the violation has occurred, although not in the peace officer's presence, and if the peace officer has probable cause to believe that the violation was committed by the person.

(11)(a) The Driver License Division shall:

(i) suspend for 90 days the operator's license of a person convicted for the first time under Subsection (2);

(ii) revoke for one year the license of a person convicted of any subsequent offense under Subsection (2) or if the person has a prior conviction as defined under Subsection (1) if the violation is committed within a period of ten years from the date of the prior violation; and

(iii) suspend or revoke the license of a person as ordered by the court under Subsection (12).

(b) The Driver License Division shall subtract from any suspension or revocation period the number of days for which a license was previously suspended under Section 53-3-223 or 53-3-231, if the previous suspension was based on the same occurrence upon which the record of conviction is based.

(12)(a)(i) In addition to any other penalties provided in this section, a court may order the operator's license of a person who is convicted of a violation of Subsection (2) to be suspended or revoked for an additional period of 90 days, 180 days, one year, or two years to remove from the highways those persons who have shown they are safety hazards.

(ii) The additional suspension or revocation period provided in this Subsection (12) shall begin the date on which the individual would be eligible to reinstate the individual's driving privilege for a violation of Subsection (2).

(b) If the court suspends or revokes the person's license under this Subsection (12)(b), the court shall prepare and send to the Driver License Division an order to suspend or revoke that person's driving privileges for a specified period of time.

(13)(a) If the court orders a person to participate in home confinement through the use of electronic monitoring, the electronic monitoring shall alert the appropriate corrections, probation monitoring agency, law enforcement units, or contract provider of the defendant's whereabouts.

(b) The electronic monitoring device shall be used under conditions which require:

(i) the person to wear an electronic monitoring device at all times;

(ii) that a device be placed in the home or other specified location of the person, so that the person's compliance with the court's order may be monitored; and

(iii) the person to pay the costs of the electronic monitoring.

(c) The court shall order the appropriate entity described in Subsection (13)(e) to place an electronic monitoring device on the person and install electronic monitoring equipment in the residence of the person or other specified location.

(d) The court may:

(i) require the person's electronic home monitoring device to include a substance abuse testing instrument;

(ii) restrict the amount of alcohol the person may consume during the time the person is subject to home confinement;

(iii) set specific time and location conditions that allow the person to attend school educational classes, or employment and to travel directly between those activities and the person's home; and

(iv) waive all or part of the costs associated with home confinement if the person is determined to be indigent by the court.

(e) The electronic monitoring described in this section may either be administered directly by the appropriate corrections agency, probation monitoring agency, or by contract with a private provider.

(f) The electronic monitoring provider shall cover the costs of waivers by the court under Subsection (13)(d)(iv).

(14)(a) If supervised probation is ordered under Section 41-6-44.6 or Subsection (4)(e) or (5)(e):

(i) the court shall specify the period of the probation;

(ii) the person shall pay all of the costs of the probation; and

(iii) the court may order any other conditions of the probation.

(b) The court shall provide the probation described in this section by contract with a probation monitoring agency or a private probation provider.

(c) The probation provider described in Subsection (14)(b) shall monitor the person's compliance with all conditions of the person's sentence, conditions of probation, and court orders received under this article and shall notify the court of any failure to comply with or complete that sentence or those conditions or orders.

(d)(i) The court may waive all or part of the costs associated with probation if the person is determined to be indigent by the court.

(ii) The probation provider described in Subsection (14)(b) shall cover the costs of waivers by the court under Subsection (14)(d)(i).

(15) If a person is convicted of a violation of Subsection (2) and there is admissible evidence that the person had a blood alcohol level of .16 or higher, the court shall order the following, or describe on record why the order or orders are not appropriate:

(a) treatment as described under Subsection (4)(d), (5)(d), or (6)(d); and

(b) one or both of the following:

(i) the installation of an ignition interlock system as a condition of probation for the person in accordance with Section 41-6-44.7; or

(ii) the imposition of home confinement through the use of electronic monitoring in accordance with Subsection (13).

§ 41-12a-302. Operating motor vehicle without owner's or operator's security—Penalty

(1) Any owner of a motor vehicle on which owner's or operator's security is required under Section 41-12a-301, who operates his vehicle or permits it to be operated on a highway in this state without owner's security being in effect is guilty of a class B misdemeanor, and the fine shall be not less than:

(a) $400 for a first offense; and

(b) $1,000 for a second and subsequent offense within three years of a previous conviction or bail forfeiture.

(2)(a) Except as provided under Subsection (2)(b), any other person who operates a motor vehicle upon a highway in Utah with the knowledge that the owner does not have owner's security in effect for the motor vehicle is also guilty of a class B misdemeanor, and the fine shall be not less than:

(i) $400 for a first offense; and

(ii) $1,000 for a second and subsequent offense within three years of a previous conviction or bail forfeiture.

(b) A person that has in effect owner's security on a Utah-registered motor vehicle or its equivalent that covers the operation, by the person, of the motor *vehicle in question is exempt from this Subsection (2).*

§ 53–3–225. Eligibility for new license after revocation

(1)(a) Except as provided in Subsections (b) and (c), a person whose license has been revoked under this chapter may not apply for or receive any new license until the expiration of one year from the date the former license was revoked.

(b) A person's license may be revoked for a longer period as provided in:

(i) Section 53–3–220, for driving a motor vehicle while the person's license is revoked, or involvement as a driver in an accident or violation of the motor vehicle laws; and

(ii) Section 53–3–221, for failing to comply with the terms of a traffic citation.

(c)(i) The length of the revocation required by Subsection 53–3–220(1)(a)(xi), (a)(xii), (b)(i), or (b)(ii) shall be specified in an order of the court adjudicating or convicting the person of the offense.

(ii) If the person adjudicated of the offense is younger than 16 years of age, the license or driving privilege shall be revoked for a minimum of one year, from age 16, but not to exceed the date the person turns 21 years of age.

(iii) If the person adjudicated or convicted of the offense is 16 years of age or older, the license or driving privilege shall be revoked for a minimum of one year, but not to exceed five years.

(d) A revoked license may not be renewed.

(e) Application for a new license shall be filed in accordance with Section 53–3–205.

(f) The new license is subject to all provisions of an original license.

(g) The division may not grant the license until an investigation of the character, driving abilities, and habits of the driver has been made to indicate whether it is safe to grant him a license.

(2) Any resident or nonresident whose license to drive a motor vehicle in this state has been suspended or revoked under this chapter may not drive a motor vehicle in this state under a license, permit, or registration certificate issued by any other jurisdiction or other source during suspension or after revocation until a new license is obtained under this chapter.

§ 53-3-227. Driving a motor vehicle prohibited while driving privilege denied, suspended, disqualified, or revoked—Penalties

(1) A person whose driving privilege has been denied, suspended, disqualified, or revoked under this chapter or under the laws of the state in which the person's driving privilege was granted and who drives any motor vehicle upon the highways of this state while that driving privilege is denied, suspended, disqualified, or revoked shall be punished as provided in this section.

(2) A person convicted of a violation of Subsection (1), other than a violation specified in Subsection (3) or (4), is guilty of a class C misdemeanor.

(3)(a) A person is guilty of a class B misdemeanor if the person's conviction under Subsection (1) is based on the person driving a motor vehicle while the person's driving privilege is suspended, disqualified, or revoked for:

(i) a refusal to submit to a chemical test under Section 41-6-44.10;

(ii) a violation of Section 41-6-44;

(iii) a violation of a local ordinance that complies with the requirements of Section 41-6-43;

(iv) a violation of Section 41-6-44.6;

(v) a violation of Section 76-5-207;

(vi) a criminal action that the person plead guilty to as a result of a plea bargain after having been originally charged with violating one or more of the sections or ordinances under this Subsection (3);

(vii) a revocation or suspension which has been extended under Subsection 53-3-220(2); or

(viii) where disqualification is the result of driving a commercial motor vehicle while the person's CDL is disqualified, suspended, canceled, or revoked under Subsection 53-3-414(1).

(b) A person is guilty of a class B misdemeanor if the person's conviction under Subsection (1) is based on the person driving a motor vehicle while the person's driving privilege is suspended, disqualified, or revoked by any state, the United States, or any district, possession, or territory of the United States for violations corresponding to the violations listed in Subsections (3)(a)(i) through (viii).

(c) A fine imposed under this Subsection (3) shall be at least the maximum fine for a class C misdemeanor under Section 76-3-301.

(4)(a) A person is guilty of a class B misdemeanor if:

(i) the person's conviction under Subsection (1) is based on the person driving a motor vehicle while the person's driving privilege is suspended, disqualified, or revoked for:

(A) any violations listed in Subsections (3)(a)(i) through (vi); or

(B) a violation listed in Subsection (3)(a)(vii) if the original revocation or suspension was based on any violations listed in Subsections (3)(a)(i) through (vi); and

(ii) the person had any alcohol in the person's body at the time of the violation under Subsection (1).

(b) A person is guilty of a class B misdemeanor if:

(i) the person's conviction under Subsection (1) is based on the person driving a motor vehicle while the person's driving privilege is suspended,

disqualified, or revoked by any state, the United States, or any district, possession, or territory of the United States for violations corresponding to:

(A) the violations listed in Subsections (3)(a)(i) through (vi); or

(B) a violation listed in Subsection (3)(a)(vii) if the original revocation or suspension was based on any violation corresponding to the violations listed in Subsections (3)(a)(i) through (vi); and

(ii) the person had any alcohol in the person's body at the time of the violation under Subsection (1).

(c)(i) As part of any sentence imposed for a violation of this Subsection (4), the court shall order:

(A) a jail sentence of not less than 48 consecutive hours;

(B) a compensatory-service work program for not less than 48 hours; or

(C) home confinement through the use of electronic monitoring in accordance with Subsection 41-6-44(13).

(ii) In addition to the penalties under Subsection (4)(c)(i), the court shall impose a fine of not less than $750.

Addendum B

MR. HALLS: I have no further questions, Your Honor.

THE COURT: Step down.

MR. HALLS: I have no other witnesses.

MR. SCHULTZ: I have no witnesses. Let me see. Do I want to put you on for anything? Do you have anything you'd like to testify about?

MR. YAZZIE: (Inaudible) -- I think you covered it.

MR. SCHULTZ: Yeah. I think we got it covered.

We rest, Judge. I do have argument.

THE COURT: Mr. Halls.

PLAINTIFF'S CLOSING ARGUMENT

BY MR. HALLS: Your Honor, the, ah -- I guess it's interesting to know what happened after. I mean the officer runs his criminal history and finds out he's got DUI's, a couple prior to this. But the issue here is what the officer knew. He's testified that he didn't know he had those DUI's, prior to the time he pulls him over.

He knows this person for, ah, 29 years, he said, but conservatively, at least 20. Knows where he lives in the State of Utah. Has never -- has -- has personally, ah, stopped him or have had occasion to stop him on over 20 occasions where he has asked for ID, which the best form of that the officer testified that they would have been trying to get his driver's license ID. And Mr. Yazzie has never been able -- has never produced it.

Ah, the officer said he had never known him to drive and never known him to have a driver's license. Sees him driving, and the first thing that comes to mind is he doesn't have a -- he doesn't have a driver's license. I think that's -- I think you stop a person under that kind of a circumstance with the personal knowledge of the individual and say, ah, "Clifton, let me see your driver's license," or, you know, "Do you have a driver's license?" And, ah, that's reasonable. If he --

THE COURT: (Inaudible) -- if, instead, he'd have called Dispatch and asked them to run Clifton Yazzie, this case would be a no-brainer, wouldn't it?

MR. HALLS: Well, I guess. Except the circum- -- yeah. But the circumstance -- should -- how far should he follow him while he does that? Should he follow him two miles?

If that -- if that thing sometimes takes three or four minutes, he could have been -- he could have been a quarter of the way to Monticello by that time. And the officer, I don't think it's necessarily reasonable to say the officer ought to follow him for four or five minutes around town while he's waitin' for Dispatch to come back for that. And that's not what the ordinary practice would have been.

I mean we've been through enough of these things. I didn't have him testify to that. But the ordinary practice is

not that you would -- you would call something in while -- they usually pull the person over, get them off to the side of the road and get an identification, and then call in on that driver's license.

THE COURT: Well, sometimes.

MR. HALLS: Well, that's -- it's been my experience that that's always pretty much what they do.

So anyway, we would submit it on that basis. We think it's reasonable.

THE COURT: We shouldn't always err on -- err on the side of interrupting someone's life, impinging on their constitutional rights. We shouldn't always err in that range.

Mr. Schultz.

DEFENSE CLOSING ARGUMENT

BY MR. SCHULTZ: Well, Judge, ah, it sounds to me like the Court's pretty well dialed into my arguments. I mean it's, ah, we're talking about the constitutional rights of my client to be free from unreasonable government intrusion. And -- and that's exactly what we have here. And the State has to show that it has justification for the intrusion of the traffic stop, and I don't think that they've done that.

This case is distinguishable from Ketron, ah, which I know this Court heard, or from other cases where the officer knows that this individual has his driver's license that's revoked or suspended.

Ah, this is a situation where the officer simply had a belief that, ah -- that this individual didn't have a driver's license. Not that there was some warrant out for his arrest, which may or may not have been true.

THE COURT: This is someone who had never bothered to get a license.

MR. SCHULTZ: Right. And -- and perhaps had the officer stopped him, like in the last couple of weeks or the last -- certainly the day before or certainly five minutes before, and found out that Mr., ah, Yazzie didn't have a driver's license, then maybe he would have more of a -- of an articulable reasonable suspicion.

But you're talking about a one or a two-year period with an ind- -- for an individual that had, as far as this officer was aware at the time, no legal constraints upon his ability to go out and obtain a valid Utah driver's license. And -- and so it's our argument that this intrusion was unwarranted and it was unreasonable. And, ah, what we have, um, I think fortuitously and not through any arduous skill of my own, is -- is some information about how -- some more information about the reasonableness of the stop.

But I think the Court made in inquiry of that of Mr. Halls. And that is is why -- you know, would it have been possible for the officer to, ah -- to have called Dispatch to find out, "Does this guy have a driver's license?" Or "Are

his driving privileges suspended or revoked in Utah?"

And the information I'm referring to is simply this. And that is if the officer -- there was -- there was no traffic violation. He didn't observe a driving pattern. This isn't a situation where the individual was speeding, where he was swerving, crossing the fog line, driving up on the sidewalk, brushing against the curb, you know, threatening other people.

And in a situation like that, where there's really no cause for concern, it's not unreasonable for the officer to say -- you know, to call Dispatch and say, "Hey, I see Clifton Yazzie drivin' out here. I don't think he's got a driver's license. What's the situation?"

Now I think if the officer would have said, "Yeah. I had done that. I called in. And gees, while I was callin' in, ah, Mr. Yazzie almost hit a lady and a baby carriage crossin' Main Street there," ah, I don't think I'd have that good an argument.

But in this situation where the last -- where this officer said he never had any knowledge of the fact that Mr. Yazzie had a -- ah, a driver's license -- excuse me -- his driving privileges were suspended or revoked, wasn't aware of any legal hindrance from Mr. Yazzie having a driver's license, that it was a minimum of at least a year before he had any reason or opportunity to check, ah, Mr. Yazzie's driving

status, ah, I think that just simply stopping someone because you don't think he's -- because the last time you knew, a year ago, he didn't have a driving privilege, is unreasonable. It isn't warranted, and I think it's a violation. And, ah, we're asking the Court for us to stop and the fruit of the poisonous tree that flows therefrom.

I'll submit it.

THE COURT: Fruit flows from a tree?

PLAINTIFF'S RESPONSE

BY MR. HALLS: Can I respond to that briefly, Your Honor?

I suppose that it does make some difference here. Well, the alcohol inquiry does make some difference, because when you know that a person has this kind of a history of alcohol, I think the officer has a suspicion in his mind not only does he not have a license, but there are some good reasons why he probably doesn't have a license.

It turns out that after they do this, he has a DUI in 1995 and one in 2001.

THE COURT: So could -- if we have a town drunk, we can always stop the town drunk whenever he's driving, just on the presumption that must be drunk?

MR. HALLS: If you have a town drunk, Your Honor, that has never had a driver's license in 29 years, and you know that he has driven several times -- well, I -- I'm gonna

back off of that. But you know the person has had lots of alcohol offenses and he's apparently driven before. He has some DUI's, but you don't discover that until later. The question is not whether or not there are other reasonable alternatives.

What Mr. -- what the Court said is "Wouldn't it have been reasonable for them to just call this in?" Well, yeah. It might have been.

There are some other things that might have been reasonable, but the question is whether or not it is unreasonable to turn around and pull this person over very briefly and say, "Show me your license." That's not unreasonable. And that's the issue. Not whether there could have been something else done. But is that unreasonable?

THE COURT: You're right. You're right.

MR. HALLS: It isn't.

THE COURT: It does occasionally get mentioned though, in judicial opinions, that there was another way to do this that would have been a lot easier. But it is true that I have to evaluate it the way it is and simply make a determination whether it's A or B, and not worry about C.

MR. HALLS: Well, --

THE COURT: You're right.

MR. HALLS: -- I -- I guess that's -- I mean it's not a hard -- it's not a hard factual case. I think the Court

has it all laid out for it. And our position is it was not unreasonable, based upon what the officer knew, to stop Mr. Yazzie to determine whether he actually did have a license or not.

COURT ORDER AND FINDINGS

THE COURT: Okay.

Well, the reason why I wished the officer had checked, ah, or watched, until he committed a traffic violation, as he probably would have, is that, ah, I'm gonna deny the motion to suppress. But I think it could be appealed, and I'd just as soon not have this added to my roster of reversals, Court Of Appeals. Because I think there's an issue here. It's not a no-brainer. It could have been one, and it isn't.

Ah, the reason that I think that it was reasonable for the officer to stop is that it was such a long time that the defendant had never had a license. I think it's reasonable to -- to believe he still doesn't have one, and he's driving now.

But there's a fairly strong argument the other way. You know, maybe he decided to go get a license, before he started drivin'. And in fact, he did. In this case it turned out he did. He got it from the wrong agency. It didn't do him any good. It was both wrong, because he wasn't a resident of Arizona, and because his license was -- and even if it was

a valid Arizona license, it was useless in Utah, because his privilege to drive in Utah was suspended. But he had -- he had apparently decided he wanted to try to get a license.

But I think it was reasonable for the officer to suspect that he did not have a license, that he was driving based on that long history and the frequent contact.

This is an unusual case. I wouldn't ordinarily permit an officer to stop someone just because once before, somebody didn't have a license. But because of the number of times and the extended period of time, I think it was reasonable for just him just to assume that yeah, he still didn't have a license. So I'm denying the motion to suppress.

Now we are going to trial next, ah --

MR. SCHULTZ: Your Honor, I want to find out. And I think I'm gonna do that in open court, if the Court can spare, ah -- spare some time and some patience with me.

I've -- I've gone back and forth with Mr. Yazzie on this and I'm not exactly sure what his, ah, undecisiveness is. And part of it may be just cause there's some confusion on his head in his mind.

But, ah, the last time I spoke with him, ah, Mr. Yazzie, ah, we talked about the fact that if you lost this hearing today, that you could plead guilty, but still preserve your right to, ah, appeal the Judge's denial of your suppression motion; is that correct?